

# ENCROACHMENT OR ACCESSION? THE IMPORTANCE OF THE EXTENT OF ENCROACHMENT IN LIGHT OF SOUTH AFRICAN CONSTITUTIONAL PRINCIPLES

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## INTRODUCTION

When someone builds on another's land, the rules of accession, specifically those of *inaedificatio*, determine the reallocation of rights in the materials used in building. That is, the owner of the immovable property, the principal, acquires ownership of the building because, by operation of law, it accedes to the land. A court's role is to confirm or deny the occurrence of accession. In principle, whether accession occurs is judged objectively in the light of a set of criteria concerned with the relationship between the building works and the land, rather than that between the builder and his materials or that between the landowner and the builder.<sup>1</sup> This mode of original acquisition of ownership, therefore, operates as a primary mechanism for the reallocation of rights in movable things that are incorporated into land, an immovable. However, when only part of the building is on the land of the other, then it seems that the rules of encroachment apply to exclude the consequence of accession. The builder thus retains ownership of the materials used in the building works notwithstanding that they have been incorporated into the soil belonging to the neighbour.<sup>2</sup> As South African case law has developed, the extent of encroachment does not appear to influence the matter. The court seems able to override the neighbour's right to demand removal of the building works — which right is an entitlement of ownership flowing from the right to uninterrupted possession — in the exercise of its

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<sup>1</sup> See D L Carey Miller & Anne Pope 'Acquisition of ownership' in Reinhard Zimmermann, Daniel Visser & Kenneth Reid (eds) *Mixed Legal Systems in Comparative Perspective* (2004) 681.

<sup>2</sup> In what follows, the words 'builder' and 'neighbour' are be used to distinguish the two landowners. 'Builder' refers to the person building on the other's land; 'neighbour' refers to the owner of the land built upon.

discretion to award compensation instead. But how does the court decide that the building dispute before it is an encroachment rather than an instance of accession?

Clearly, more than one set of principles apply to the situation where one person builds on another's land. Deciding which principles take precedence in a given situation should be based on clear reasoning that reflects adherence to the structure of property law so that certainty and reasonable, practical outcomes are achieved. The extent of encroachment would be significant in guiding the court to make the determination of the choice of rules, as a preliminary matter. Where policy dictates a solution contrary to a structured approach, the reasons for such variation must be compelling and accord with the constitutional requirements for protection of property rights.

The established approach in South African courts seems to regard every instance of building partly on a neighbour's land as an encroachment. Consideration is given only to whether removal of the building works should be ordered or compensation awarded to the neighbour. This approach does not give due consideration to the rights of the neighbour and arguably results in an arbitrary deprivation of the neighbour's property in terms of s 25(1) of the Constitution.<sup>3</sup> This is particularly the case when the encroachment is very extensive, as in the case under consideration here. This article contends that, in order to comply with its constitutional obligations<sup>4</sup> to develop the common law in light of the values enshrined in the Bill of Rights, a court must adopt a nuanced approach to situations involving building on another's land so as to give proper attention to the rights of both parties and thus to prevent the possibility of unfair deprivation. That the parties themselves have not questioned the status quo is of no significance:

'The courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights. . . [T]his duty upon judges arises. . . whether or not the parties in any particular case request the court to develop the common law under s 39(2).'<sup>5</sup>

I argue below that the extent of encroachment must guide the court in its decision to regard the interference with possession as an encroachment rather than an instance of accession so as to maintain the integrity of the principle-based structure of property law. In essence, the ambit of the rules of encroachment should be restricted to situations where the extent of encroachment is minor or trivial, ie insignificant. Furthermore, in the determination of whether and how the builder should be compensated, a failure in the case law to separate clearly unjustified enrichment issues from

<sup>3</sup> Constitution of the Republic of South Africa, 1996.

<sup>4</sup> The courts have the inherent power to develop the common law (s 173 of the Constitution) and must do so with due regard to the spirit, purport and objects of the Bill of Rights (s 39(2) of the Constitution); see also *Carmichele v Minister of Safety and Security* (henceforth *Carmichele*) 2001 (4) SA 938 (CC) para 34; *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) paras 16–17.

<sup>5</sup> *Carmichele* supra note 4 para 36.

interferences with proprietary rights has blurred the distinctions in situations where building over the boundary line has taken place, resulting in the potential for an arbitrary deprivation of the neighbour's property. To frame the issues, I begin by analysing a recent case. Within the constitutional context, I then proceed to examine the context of ownership principles in which accession operates, as well as the established exceptions to the *ex lege* outcome of accession, the nature of encroachment, and the law's treatment of interferences with invasions of possession. The last part deals with whether reallocation of rights or compensation for the neighbour is the appropriate remedy in particular situations. Specifically, I propose that, in order to maintain the integrity of the principle-based structure of property law, the extent of encroachment must guide the court in its decision to regard the interference with possession as an encroachment rather than an instance of accession. Secondly, if encroachment rules apply, then the extent of encroachment informs the decision whether to support the neighbour's demand for removal. Thirdly, if the decision is to compensate the neighbour, then the extent of encroachment informs the determination of the measure of compensation to be awarded, in light of the requirements of s 25(3) of the Constitution.<sup>6</sup> Necessarily, therefore, the extent of encroachment is integral to a constitutionally sound consideration of the situation where building occurs partly on another's land.

#### THE FACTS OF *TRUSTEES, BRIAN LACKEY TRUST v ANNAN-DALE*<sup>7</sup>

The facts of this case are simple if startling: the Trust began building a large luxury house that was meant to straddle the boundary between the two (consolidated) erven it owned. Instead, building took place over the boundary between the erven owned by the trust and that owned by a neighbour, Stanley Annandale. By the time the error was discovered, the house was some nine weeks from completion and the result was an 'inadvertently erected' encroachment, according to the court, of proportions that boggle the mind. Fully eighty per cent of neighbour Annandale's land was occupied by the house.<sup>8</sup> The parties being unwilling to resolve the matter amicably, the builder sought a declaratory order: it wanted an assurance that demolition was not inevitable; the neighbour countered, insisting on his right to demand demolition. The court found that it had discretion to award compensation and thus declared that the neighbour was 'not entitled to the removal. . . of the encroachment'.<sup>9</sup>

<sup>6</sup> This subsection sets out the considerations when determining 'the amount of compensation and the time and manner of payment'.

<sup>7</sup> 2004 (3) SA 281 (C) (hereafter *Brian Lackey Trust*).

<sup>8</sup> *Ibid* para 4.

<sup>9</sup> *Ibid* para 45.

Several issues arising from these facts merit comment, but only the final point is elaborated upon:

- (1) When the error of building was discovered, the builder offered to purchase the land, which offer was rejected by the neighbour, who demanded a higher purchase price, failing which, removal of the encroachment. The latter demand amounts to an assertion of the owner's right to uninterrupted possession, an incident of ownership. Surprisingly, this demand for removal was rejected by the builder, apparently without a legal basis. One wonders why the neighbour's legal representative did not seek a declaratory order at this point in the process. At best, this builder has the right to seek compensation for unjustified enrichment, ie compensation for the materials and labour expended in building on the neighbour's land. This right cannot without more override the neighbour's entitlement flowing from the real right of ownership.

- (2) The judgment frames the issues as

'whether or not a "massive encroachment", inadvertently erected by the plaintiffs on land belonging to defendant, ought to be demolished. This issue, in turn, depends on whether or not the court has a discretion to permit the plaintiffs to retain the structure — and effectively acquire the defendant's land in the process — against payment of compensation to the defendant'.

With respect, whether demolition ought to occur is to be determined on the merits of the matter, while the existence of a discretion is a matter of law to be determined as a preliminary step. In the situation before the court, the issue was whether the court had discretion to override the owner's right to uninterrupted possession (and hence the right to demand removal of an encroachment). The issue ought to have been framed, therefore, as whether, on the facts of the case, the right to removal must be supported.

- (3) An unusual aspect of the case is that the plaintiff is the builder. Most of the reported cases involve the neighbour seeking redress. In this instance, the builder requested a declaratory order to the effect that the neighbour was entitled not to removal but to payment of compensation by the builder. In other words, the builder claimed that his right to compensation on the basis of unjustified enrichment should override the neighbour's right to repel interference with possession. In effect, the builder was insisting that the court should sanction a forced sale of the encroached-upon land. What is the legal basis for this? The builder commits a wrong, albeit inadvertently, by interfering with the possession of the neighbour and consequently demands acquisition of ownership of the land. This amounts to a demand for expropriation. Arguably, this is not a good cause of action and defendant ought to have challenged it by way of exception. The builder is free to request a declaration of rights, but is not entitled, at any price, to demand the land of another, even if he has built thereon. The neighbour, on the other

hand, being the owner of the land, is *entitled* to demand removal of the encroachment. The court's role is to determine whether, on the facts, this entitlement should be supported.

- (4) Nowhere in the judgment is the issue of accession raised. Seemingly without question, the matter is dealt with as one of encroachment. The builder intended to build on his own land, but made a mistake as to the identity of the erven upon which building actually took place. No dispute is possible about whether the movables have been incorporated into the land. But who owns the land? Why does the builder 'retain' ownership in the building that has patently acceded to the land belonging to the neighbour? What exactly is an encroachment? The finding that he who builds on eighty per cent of his neighbour's land, nevertheless owns the building (and can claim the land) is counterintuitive and seems to result in an arbitrary deprivation of the neighbour's property. Logically and in accordance with principle, the neighbour ought to own the building on his land through accession. This result would accord with an objective assessment of the factual situation. In circumstances where encroachment is not extensive, it may make sense, for policy reasons, to resolve the dispute by reallocating the rights in the encroached-upon land through exercise of the court's discretion, rather than by confirming the (automatic) reallocation of rights in the (previously movable) materials used in the building works by accession. However, policy cannot be permitted to violate the protection of property rights guaranteed by the Constitution without justification, which means that compelling reasons must exist for the neighbour's entitlement to demand removal to be overridden in favour of the builder.

## THE CONSTITUTIONAL CONTEXT

The property clause in the Constitution prohibits deprivation of property unless in terms of a law of general application, which may not permit arbitrary deprivation.<sup>10</sup> The meaning of 'arbitrary' was explored recently by the Constitutional Court,<sup>11</sup> which concluded that 'arbitrary' in terms of s 25(1) means that 'the law does not provide sufficient reason for the particular deprivation in question or is procedurally unfair'.<sup>12</sup> Whether 'sufficient reason' exists is to be determined on the basis of an evaluation of

<sup>10</sup> Section 25 of the Constitution.

<sup>11</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) (hereafter *Wesbank*).

<sup>12</sup> *Ibid* para 100. The court outlines the steps according to which 'sufficient reason' is to be determined:

- (a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.
- (b) A complexity of relationships has to be considered.

the complexity of relationships involved, including the purpose of the deprivation, the effect on the person whose property is affected, and whether all the incidents of ownership are affected by the deprivation, in which case the purpose of deprivation must be more compelling. While the Constitutional Court dealt with provisions of customs and excise legislation rather than common law principles, doubtless the approach would be similar in the latter instance. Since the property in the case under discussion is land and all the incidents of ownership are involved, in accordance with *Wesbank*, only a compelling purpose qualifies as sufficient reason for the deprivation. The issue here, therefore, is whether a sufficient reason exists for overriding the outcome of accession, the primary mechanism for reallocation of rights in situations like the present, viz where building work has taken place, in favour of the residual mechanism for resolution of disputes concerning building over the boundary line. This requires careful analysis of the context of ownership principles in which accession operates, as well as of the established exceptions to accession, the nature of encroachment, and the law's treatment of invasions of possession. Only then is it possible to consider adequately whether, in light of constitutional principles, compensation is the appropriate remedy or whether application of encroachment principles should be considered. These are the topics of the next sections.

## THE CONTEXT OF ACCESSION

The modern civilian ownership right knows only one form, ie a thing is either owned or not. There are no stages or degrees of ownership except where statutory provisions stipulate otherwise.<sup>13</sup> Where a change of ownership is at issue, therefore, one looks for a single act or event as the actuating factor.<sup>14</sup> The rules governing acquisition of ownership deal with a fundamental tension of property law, viz that between intention (represent-

- (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
- (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
- (e) Generally speaking, where the property in question is ownership of land or a corporeal movable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.
- (f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.
- (g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.
- (h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with "arbitrary" in relation to the deprivation of property under s 25.

<sup>13</sup> For example, the land reform concept 'initial ownership' in terms of the Development Facilitation Act 67 of 1995.

<sup>14</sup> Carey Miller & Pope op cit note 1 at 674.

ing the interests of the parties concerned) and publicity (serving the interests of third parties). In managing this tension, the rules must balance the interests of the various parties so as to limit the effect of intention and to ensure sufficient publicity.<sup>15</sup> Property law is structured and principle-driven in order to provide certainty, especially about land issues. Sometimes, however, decisions that appear to be driven by socio-economic policy can complicate matters.

The hallmark of original acquisition of ownership is that, by operation of law, the presence of specific, objectively determined, factors results in a reallocation of rights, providing a stark exception to the norm that ownership is not lost involuntarily.<sup>16</sup> Different modes of original acquisition of ownership supply rules that confirm or deny the reallocation of rights in particular circumstances. In each case, possession and intention, amongst others, are factors that determine reallocation. Original acquisition of ownership is associated with a definite point in time, an act or an event, judged objectively, on the basis of which a change of ownership occurs. In this respect similarity exists between original and derivative acquisition of ownership, the latter's definite point requiring simultaneous co-existence of a real agreement and delivery to signal the transfer of ownership.

In the case of joined or mixed things, necessarily the nature of the join or mixing identifies which rules apply to the particular factual circumstances. Thus, where one thing is joined to another so that the former loses its identity to the latter through becoming part of the latter, then the rules of accession apply. The owner of the principal thing — land as immovable property is always the principal — acquires ownership of the attached things, apparently on a primary basis. That is, in the absence of circumstances where an exception applies,<sup>17</sup> an agreement between the parties cannot prevent accession if the objective appearance indicates its occurrence. In other circumstances, reallocation of rights depends on the separability of the mixture and on whether the mixed things retain their identity, according to the rules of confusion/commixtion, but on a residual basis. In other words, where no agreement to the contrary exists, the rules of confusion/commixtion apply. In the case of accession, however, the existence of an agreement cannot change what is obvious to the observer: the incorporation

<sup>15</sup> Ibid.

<sup>16</sup> Indeed, the strength of this norm is such that the distinction between original and derivative acquisition of ownership is frequently glossed over, as is revealed in the oft-quoted dictum by Innes CJ in *MacDonald v Radin NO and the Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 at 467 (henceforth *MacDonald*), which dealt with *inaedificatio*: '[T]he fundamental principle [is] that . . . dominium cannot be transferred or altered, save by the intent of the dominus'. L P W van Vliet 'Accession of movables to land' (2002) 6 *Edinburgh LR* 67–84 and 199–216 argues most cogently that a misinterpretation of Roman-Dutch texts has led to the inference that the intention of the owner of the movable turns it into an immovable.

<sup>17</sup> See below.

of one or more things into another, unless policy reasons dictate otherwise. In light of *Wesbank*, such reasons would have to be compelling.

A further tension in this area of law is that between principle and policy. How is it determined whether structure and dogma (principle) should prevail over solutions sought for particular fact categories (policy)? The interplay between principle and policy is well illustrated in the difficulties that accompany the determination of reallocation of rights in property. The principles that underlie reallocation of rights in the case of *inaedificatio* are publicity,<sup>18</sup> given effect to by an objective assessment of the reasonable expectation of an outsider, and protection of ownership. Neither principle is given precedence on a consistent basis, which means that, sometimes, policy choices determine that principle should not apply, or should be interpreted in a particular way, in the public interest. For example, a policy position that 'supports preservation of value would leave the composite thing whole rather than reduce it to its constituent parts'.<sup>19</sup> Similarly, policy might discourage disproportionate prejudice to one neighbour, thus requiring principle to give way to policy. In the context under consideration, arguably, this rationale would underpin the application of encroachment rules where the extent of building over the boundary line is trivial or insignificant.

Policy by its nature is flexible, so that individual cases can be treated on their own merits. But when policy is so flexible as to obscure the presence of principle, the law becomes uncertain and confusing. It is important for the courts to clarify the law because of their constitutional obligation to develop the common law and to realize the constitutional rights of all. Interpretation of the factors<sup>20</sup> applicable to *inaedificatio* has been inconsistent in South African law. The cases demonstrate that intention is weighted differently in different factual circumstances,<sup>21</sup> apparently for policy reasons, but sometimes in defiance of principle.<sup>22</sup> The line between original and derivative acquisition of ownership may be fine, but it is important because each operates on a fundamentally different basis. The former occurs mechanically

<sup>18</sup> Van Vliet op cit note 16 at 69–70.

<sup>19</sup> Carey Miller & Pope op cit note 1 at 678; Van Vliet op cit note 16 at 69 and 199.

<sup>20</sup> Outlined in *Olivier v Haarhof & Co* 1906 TS 497 as the nature and purpose of the movable, the degree and manner of its annexation, and the intention of the owner of the movable with regard to its attachment.

<sup>21</sup> MacDonalld supra note 16, *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Transvaal)* 1980 (2) SA 214 (W) (henceforth *Melcorp*), *Theatre Investments (Pty) Ltd v Butcher Brothers Ltd* 1978 (3) SA 682 (A) (henceforth *Theatre Investments*) and *Konstanz Properties (Pty) Ltd v Win Spilhaus en Kie (WP)* 1996 (3) SA 273 (A) (henceforth *Konstanz Properties*); *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) (henceforth *Unimark*).

<sup>22</sup> See *Melcorp* supra note 21 (lift in a high-rise building held to be movable); *Simmer & Jack Mines Ltd v GF Industrial Property Co (Pty) Ltd* 1978 (2) SA 654 (W) (mine dump held to be movable); see also Van Vliet op cit note 16 at 205–9.



in the presence of objectively determined factors, while the latter requires active involvement of the parties concerned.

## EXCEPTIONS

Although in principle *inaedificatio* concerns the relationship between land and building works, the identity of the builder is relevant sometimes for the purpose of a practical resolution to a particular problem in so far as the automatic reallocation of rights in the attached movable property is concerned. In such a case, the mechanism must be seen as residual rather than primary.

Thus, a usufructuary has no claim for improvements, but may remove ornamental additions. By implication, the improvements accede to the principal. By inference, the dominant owner would have a similar right of removal, were he to have built on the servient tenement in the course of exercising servitudinal rights.<sup>23</sup>

When the builder is a tenant, the outcome of accession may be suspended until termination of the lease. Thus, perhaps unremarkably, the tenant may build, within limits as recorded in the lease agreement, and may remove that which was built on termination of the lease.<sup>24</sup> More interesting is the situation where the tenant builds without the landlord's consent and is thus in a position similar to that of a *mala fide* possessor. The tenant may separate or break down the structures and remove the materials, but has no claim for compensation. This right to removal may derive from the *ius tollendi*, granted to all possessors, which serves to postpone accession in order to prevent unjustified enrichment of the landlord.<sup>25</sup>

A further exception applies in the case of a *bona fide* possessor, who has a right of retention until such time as compensation for the improvement to the property of the true owner is paid.<sup>26</sup> This right is not personal, but rather *sui generis* in nature. The maxim

<sup>23</sup> C G van der Merwe & M J de Waal *The Law of Things and Servitudes* (1993) para 260.

<sup>24</sup> *De Beers Consolidated Mines v London & South African Exploration Co* 10 SC 359 at 370.

<sup>25</sup> As authorized by the 1658 Placaet of the States of Holland re-enacted in 1698. The nature of the right of removal is probably real (cf the right of superficies in German, Swiss and French law discussed by Van Vliet op cit note 16 at 70) but is dependent on the personal right in terms of the lease. It should be noted that the Placaet applies only to rural leases: see *Business Aviation Corporation v Rand Airport Holdings* 2006 (6) SA 605 (SCA) at 612. Nevertheless, in the matter under consideration here, this finding has no effect because the common law provides a similar right derived from the general *ius tollendi*.

<sup>26</sup> See *United Building Society v Smookler's Trustees and Golombick's Trustee* 1906 TS 623 (henceforth *UBS v Smookler's Trustees*); J G Lotz (updated by F D J Brand) 'Enrichment' in W A Joubert (founding ed) *The Law of South Africa* vol 9 2 ed (1996) para 231.

‘no man may enrich himself at the cost of another, [modifies], to the extent to which it applies, the still more ancient maxim that whatever is affixed to the soil passes with the soil, and similarly that whatever is inextricably mingled with a chattel becomes part of that chattel’.<sup>27</sup>

It seems, however, that a mala fide possessor does not have such a right of retention.<sup>28</sup> This accords with the position in later Roman law.<sup>29</sup>

What these exceptions indicate is a practical approach to a structured principle-dependent framework that governs building on land owned by another. That no exception exists for a mala fide possessor provides support for the view that structure must be regarded as important. Ownership, the most complete real right, is a fundamental value in South African society — as the protection provided in the Constitution indicates — which means that it should be protected in principle from unwarranted interference by others. Thus the exceptions created for tenants and bona fide possessors protect ownership: in the case of the tenant builder, his ownership in the movable goods is preserved despite attachment to the land, unless the tenant chooses not to remove them at the termination of the lease or neglects to do so within a reasonable time, in which case the outcome is automatic acquisition of ownership for the landowner. That is, the contract-dependent personal right ceases to exist at a particular time, specified in the lease; the ‘infinite’ real right of the landowner, in abeyance for the duration of the lease, revives upon its termination. Here one can see policy taking precedence over principle for practical reasons. A tenant needs to be able to make changes to suit the purpose of the lease, but then the landowner’s otherwise automatic acquisition of ownership of attached things must be controlled and regulated for the sake of fairness and practicality.

The bona fide possessor builder, on the other hand, loses ownership in the attached movables — principle takes precedence — but he is entitled to fair compensation on the basis of a claim for unjustified enrichment. He is treated sympathetically in so far as the changes to the land would have been made innocently. It is thus easy to understand why no exception exists for a mala fide possessor. There is no obvious reason to treat sympathetically someone who deliberately interferes with another’s possession of land to the extent that he builds thereon. But what of the situation where the builder builds over the boundary line, whether negligently or deliberately, but does not build wholly on the land of the neighbour?

## ENCROACHMENT

According to Milton,<sup>30</sup> the term ‘encroachment’ is both a descriptive device as well as a ‘term of art’. The term describes situations where airspace over

<sup>27</sup> *UBS v Smookler’s Trustees* supra note 26 at 627.

<sup>28</sup> Ibid at 633.

<sup>29</sup> See below.

<sup>30</sup> J R L Milton ‘The law of neighbours in South Africa’ 1969 *Acta Juridica* 123 at 234.

the neighbour's land is invaded by objects originating on the builder's land and where the boundary line between the two properties is overreached 'usually only for a matter of a few inches or feet'. As a term of art, encroachment indicates 'the situation where a building is erected wholly or substantially on a neighbour's land'. Both sets of circumstances give rise to an action for the neighbour.<sup>31</sup>

Modern South African textbooks,<sup>32</sup> however, deal with encroachment in a somewhat cryptic fashion, stating merely that one must be careful to build only on one's own land. In the event that one is not careful, then various possible solutions are outlined. The cases indicate that sometimes demolition is ordered; sometimes the encroacher keeps the building and acquires the land as well.<sup>33</sup> Interestingly, the latter solution seems not to stem from exercise of the court's discretion but rather is dependent upon the neighbour's willingness not 'to press his strict rights to their fullest' and to transfer the land to the builder instead. This important distinction is not always acknowledged in texts or later case law. The implication of the distinction must be that, if the neighbour is unwilling to divest himself of ownership, then, whether the court has power to in effect order a forced sale requires analysis and justification in light of the principles governing expropriation. It is thus misleading to include transfer of the neighbour's land as a possible solution without indicating the important rider, namely that the neighbour's willingness to co-operate is essential. In effect, for this solution to stand up to scrutiny, the transaction has to be one involving derivative acquisition of ownership, for which the transferor's co-operation is required, ie the transaction is bilateral. The current rendition in the textbooks and the later cases implies that the court's power is to effect an original mode of acquisition of ownership by ordering transfer against the will of the neighbour, ie a unilateral transaction.

There does not appear to be any principled framework that forms the basis for deciding whether encroachment rules are applicable or not. Nor is the extent of encroachment discussed as a possible trigger for use of the rules. Although the court in this instance concedes that the cases discussed by Milton were concerned with 'less substantial encroachments, none of which entailed a complete deprivation of the innocent owner's property',<sup>34</sup> it goes

<sup>31</sup> On the basis that the entitlement to uninterrupted possession has been violated. The position in English law was different because the English concept of trespass, which provided the remedy for such situations, differs fundamentally from the South African concept; see Milton op cit note 30 at 234.

<sup>32</sup> See eg P J Badenhorst, Juanita M Pienaar & Hanri Mostert *Silbergberg and Schoeman's Law of Property* 5 ed (2006) 121–5; C G van der Merwe 'Things' in W A Joubert (founding ed) *The Law of South Africa* vol 27 First Reissue (2002) para 317; Van der Merwe & De Waal op cit note 23 para 126; C G van der Merwe *Sakereg* 2 ed (1989) 202.

<sup>33</sup> See *Christie v Haarhof* (1886) 4 HCG 349 and *Van Boom v Visser* (1904) 21 SC 360, cited in Milton op cit note 30 at 243.

<sup>34</sup> *Brian Lackey Trust* supra note 7 para 21.

on to state '[i]t is equally true . . . that none of those cases decided that the court's discretion, as a matter of law, is *not* available in cases of more serious encroachment'.<sup>35</sup> No textbook addresses the issue of precisely when encroachment rules are triggered or how one should deal with the clear overlap between inaedificatio and encroachment. One instance of building on or just over a boundary line, usually to construct a wall between neighbours (known as a party wall), may provide some insight.

The consequence of building a wall on the boundary between two erven is that each adjacent owner automatically acquires a fifty per cent interest in the wall. By operation of law, the rights in the wall are reallocated, whether building on or over the boundary line occurred intentionally or inadvertently. Henceforth, the relationship between the neighbours is governed by the rights and duties as set out in so-called party-wall rules. In this instance, then, the interplay between publicity and protection of ownership results in a consequence that achieves recognition of both principles: from the observer's point of view (publicity), the factual situation accords with the legal position in so far as the position of the wall and the allocation of ownership rights are concerned. Neither owner suffers a deprivation of ownership but rather each is put to terms, as it were, for the purpose of how they must conduct themselves in future regarding the wall. They share responsibility for its upkeep and may not act unilaterally to alter it. Rather than treating it as an encroachment (and thus subject to the neighbour's right to demand removal), the law chooses to make the neighbours deal with each other about the wall, probably for practical reasons. A modern application of the law's practical attitude towards neighbours is to be seen in sectional title ownership, which involves similar automatic sharing of ownership rights and responsibilities regarding the walls that separate the units.<sup>36</sup>

## INTERFERENCE WITH POSSESSION

Amongst the entitlements of ownership is the entitlement to repel invaders. When persons invade and take up occupation on another's land, the right to repel is governed to a great extent now by statutes,<sup>37</sup> resulting in a limitation of the right. The justification for the limitation flows from the constitutional rights of both occupiers and owners, as well as the acknowledgement of the socio-economic and political context.<sup>38</sup> In a given situation, the facts

<sup>35</sup> Ibid.

<sup>36</sup> See Badenhorst et al op cit note 32 at 477; H J Delpont *South African Property Practice and the Law* 2 ed (2001) 99; D L Carey Miller & Anne Pope *Land Title in South Africa* (2000) 219; C G van der Merwe *Sectional Titles, Share Blocks and Time-Sharing* (1995) vol 1 chaps 2 and 3.

<sup>37</sup> For example, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, the Extension of Security of Tenure Act 62 of 1997, the Land Reform (Labour Tenants) Act 3 of 1996, and the Rental Housing Act 50 of 1999.

<sup>38</sup> Property rights, like all other rights in the Bill of Rights, may be limited in terms of s 36 of the Constitution.

surrounding the unlawful occupation are analysed on a principled basis to find a justifiable solution that satisfies the constitutional imperative. When a builder invades another's land, is the other's right limited in a similarly principled manner?

In Roman and Roman-Dutch Law, the right to resist such invasion depended on the nature of the invasion, especially the origin of the invasion. Thus, in Roman Law, where the invasion consisted of overhanging in so far as it originated on the builder's land and overhung the boundary to invade the neighbour's land, then the neighbour was not at liberty to remove the invasion himself, but had to use the *actio negatoria* to force the builder to concede that he had no servitude over the neighbour's land and thus must remove the overhanging thing. When, however, the invasion originated on the neighbour's land, he could remove the building himself because, on the basis of accession, he was the owner of the offending building.<sup>39</sup> In line with the usual entitlements of ownership, he could use and enjoy his land according to his own dictates, including remove that which he did not want.

In South African law, the position is stated to be that an owner may not act himself to remove any invading building but must approach a court for relief.<sup>40</sup> According to Milton, the right of an owner 'to demand removal seems to be absolute for he is vindicating the freedom of his property from unlawful interference'.<sup>41</sup> Clearly, though, to permit the owner to demand removal in every instance could lead to injustices and economic waste. Hence, the court has a discretion<sup>42</sup> to substitute an order for compensation in appropriate situations, e.g. where the invasion is trivial and the cost of removal is excessive. 'The Court would be slow to order removal . . . if the justice of the case could be met by an award of damages.'<sup>43</sup> In *Higher Mission School v Grahamstown Town Council*, although the finding (incorrectly) was that removal had to be ordered, there being no discretion to award compensation, Van der Riet J specifically stated that in a case 'where an extensive building has been erected at great expense partly upon land of little value belonging to a third party', argument would be required before it is clear that a court is 'bound to order removal. . . even if it be established that the encroachment was made in ignorance'.<sup>44</sup>

<sup>39</sup> Voet 8.2.24; see Milton op cit note 30 at 236; also *Smith v Basson* 1979 (1) SA 559 (W) regarding implantatio: Plants that have originated elsewhere but have taken root on the neighbour's soil, can be removed by the neighbour.

<sup>40</sup> See Milton op cit note 30 at 236 where *UBS v Smookler's Trustees* supra note 26 at 627 is cited as authority; however, this case dealt not with encroachment but with lien and the *ius retentionis* and thus with unjust enrichment.

<sup>41</sup> Milton op cit note 30 at 241.

<sup>42</sup> See *Rand Waterraad v Bothma* 1997 (3) SA 120 (O) where Hattingh J traces the existence of such a discretion.

<sup>43</sup> Per Innes CJ in *Hornby v Municipality of Roodepoort* 1918 AD 278 at 290.

<sup>44</sup> 1924 EDL 354 at 366. The case involved an encroachment by an electric power plant.

Clearly, an evaluation of the competing interests is required, including the loss for both parties. The question therefore is when should compensation for the neighbour or reallocation of ownership rights to the builder be the appropriate remedy?

### COMPENSATION OR REALLOCATION OF RIGHTS?

The Roman maxims *superficies solo cedit*<sup>45</sup> and *omne quod inaedificatio solo cedit*<sup>46</sup> provide the foundations for the rules of *inaedificatio* according to which reallocation of rights occurs.

Historically, the maxims were qualified in particular circumstances. However, none of the sources is explicit about whether the circumstances describe situations where the builder builds only partly on the land of the neighbour, ie erects an encroachment, or builds wholly on the land of another. The Twelve Tables rule awarded the builder double the value of his timber built into the building of another by the *actio de tigno*, on the basis that the builder retained ownership in his materials. This rule prevented the unnecessary demolition of buildings in a particular context. In later Roman law, whether the builder knew that he built on soil of another determined the outcome. If he knew, he was taken to have parted voluntarily with his materials, but if he built in ignorance, then he did not lose ownership in his materials, on the basis that 'no-one should gain profit to the detriment and injury of another'.<sup>47</sup> This attitude forms the basis for a claim in unjustified enrichment. In Roman-Dutch law, a similar attitude is apparent, the *bona fide* possessor being entitled to expenditure incurred in the building of the improvements.

According to *Bellingham v Bloometje*,<sup>48</sup> the *bona fide* possessor is entitled to compensation for useful expenses. No mention is made of ownership of the materials, but impliedly the owner of the soil has undisputed ownership thereof. In *Barnard v Colonial Government*,<sup>49</sup> the court explains that where the owner refuses to pay compensation on the ground that the 'improvements are so expensive that the owner would not have effected them himself', then, according to Voet, the builder can remove materials. He must do so without injury to the land and claim compensation for the rest to the value 'as the materials would have been worth to him after the removal'. The basis for suspension of the rules of accession appears to be a right of removal for the builder, flowing from the maxim that condemns unjustified enrichment.<sup>50</sup>

According to De Vos,<sup>51</sup> writing about unjustified enrichment, a distinction must be made between a *bona fide* possessor and an encroacher. The

<sup>45</sup> Buildings form part of the land.

<sup>46</sup> Everything built on the soil belongs to the soil.

<sup>47</sup> D 50.17.206 as cited in *UBS v Smookler's Trustees* supra note 26 at 627.

<sup>48</sup> 4 Buch 36.

<sup>49</sup> 5 Juta 122.

<sup>50</sup> Ibid at 124–5.

<sup>51</sup> *Verrykingsaanspreklikeid in die Suid-Afrikaanse Reg* at 71 (cited in Milton op cit note 30 at 244).

latter is not treated in the same way as the former. In the absence of fault, the encroacher is not liable for damage wrought to the land through building works, but the owner without more is entitled to demand removal.<sup>52</sup> This is because the owner can reject the enrichment, whereas in the case of the bona fide possessor (who builds wholly on the owner's land), the owner cannot insist on removal. De Vos does not explain the reason, but it must be that, because the building works belong to him by accession, he must remove them himself. Furthermore, in *Christie v Haarhof*, which involved a building that 'encroached to a considerable extent on plaintiff's land',<sup>53</sup> the court stated 'there is no doubt that the plaintiff [neighbour] is legally entitled to evict the defendant [builder] on payment of compensation for the value of the buildings erected'.<sup>54</sup> This dictum supports the view that the neighbour's entitlement flows from his ownership of the land that has been built on. That the neighbour in *Christie v Haarhof* was willing to divest himself of ownership of the land made for a satisfactory solution in that matter, but the basis on which a court might so order was not explained. Were a court to issue such an order, this would amount to an expropriation for the neighbour which would raise other issues, not the least of which is that the power to expropriate is reserved to the State.<sup>55</sup> The value of this case as precedent for the proposition that a court can order transfer against the will of the neighbour is thus questionable. As is apparent from the preceding discussion, the cases do not provide a clear picture of when compensation should be favoured over reallocation of rights as the appropriate remedy. However, if, as a preliminary step, the extent of encroachment is examined, then it will be clearer when reallocation of rights or compensation is appropriate for the particular circumstances.

### TRIGGER FOR ENCROACHMENT RULES

It is evident that issues of compensation inform the qualifications to the maxims governing accession, which, in the context of minor or insignificant encroachment, makes sense. It allows the conflicting interests to be weighed and assessed on the basis of reasonableness and fairness, which are prominent principles in neighbour law.<sup>56</sup> It is obvious that accession cannot provide a satisfactory solution where one party has built partly on the land of another

<sup>52</sup> It would appear that only minor or insignificant encroachment is under consideration by De Vos, since he makes the point that, 'on the basis of general principle, compensation ought to be awarded [to the builder] when the landowner is enriched by the attachment (which will seldom be the case) and does not insist on removal' (my translation); see Milton *op cit* note 30 at 244.

<sup>53</sup> See Milton *op cit* note 30 at 243.

<sup>54</sup> *Christie v Haarhof* *supra* note 33 at 353.

<sup>55</sup> See, e.g., *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) para 63.

<sup>56</sup> See François du Bois & Elspeth Reid 'Nuisance' in Zimmermann, Visser & Reid *op cit* note 1 at 576–604; *Rand Waterraad v Bothma* *supra* note 42 at 133.



and has a right of retention in the materials that suspends the effect of accession. There has to be a determination of ownership of the building works. In the case of a party wall, it is sensible to allocate the rights so that each owner has an interest which includes both rights and duties. However, when the building takes the form of a house, it is not sensible to share the rights between different owners who have not intended to share ownership. It is also not sensible to order removal where compensation and an adjustment of rights would resolve the matter more satisfactorily.

Necessarily, the extent of encroachment must be factored into the assessment of what is reasonable and fair in the particular situation. The question to be answered is whether the rules of accession ought to be suspended in the circumstances, allowing the exception of encroachment to prevail. The extent of the encroachment is relevant, thus, to the determination of whether the matter is to be dealt with as an instance of accession or encroachment, in the first instance. Secondly, if encroachment rules do apply, whether the court ought to exercise its discretion to refuse the order for removal in the circumstances must be determined. Thirdly, the extent of encroachment is relevant to the determination of the measure of compensation to be awarded. The conflicting interests of the parties have to be weighed and the impact of the (potential) loss to each assessed. The public interest in avoiding economic waste is also relevant to the determination.

The older cases do not consistently mention the extent of the encroachments at issue but frequently there are indications that they are of an insignificant nature.<sup>57</sup> The court in *Brian Lackey Trust* can see no reason for limiting the exercise of discretion to situations involving only minor or trivial encroachments. ‘Why’, it asks,

‘should the court have a discretion to order damages instead of demolition where the eaves of a roof encroach by 11½ inches; or where a 15-storey block of flats encroaches by a “couple of inches”; but not where it encroaches to a considerable extent. . .?’<sup>58</sup>

A possible answer is that the alternatives are not confined to the two outlined, namely an order for removal or compensation for the neighbour. If the rules of accession take precedence, then the position is wholly different.

## SOLVING THE PROBLEM

Reasonableness and fairness are acceptable principles in the assessment of the conflicting interests involved to decide how the particular problem between neighbours should be resolved. Thus it is understandable that where a trivial encroachment is involved, the matter can be resolved by persuading the neighbour to give up a portion of his land, subject to compensation. But when the outcome is that the neighbour is to be deprived of the whole of his

<sup>57</sup> See the cases cited by Milton *op cit* note 30 at 241–4.

<sup>58</sup> *Brian Lackey Trust* *supra* note 7 para 29 (footnotes omitted).



land, then, in accordance with the test in *Wesbank*, ‘a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation’.<sup>59</sup> In addition, the distinction between a deprivation and an expropriation would have to be managed.<sup>60</sup>

What compelling purpose for deprivation is present in this instance? One possibility is to foster neighbourliness. Another is to prevent economic waste. Is either sufficiently compelling? Economic waste occurs on a daily basis in the property market. Frequently people buy improved land and immediately demolish the existing house to build a more luxurious one or at least make extensive renovations. In similar vein, neighbours are notorious for poor relationships, hence the need for neighbour law. Is the compelling purpose in this case the view that the neighbour can be compensated in full for his loss whereas the builder might be compensated only in part for his error? This might be a fair and reasonable consideration. If the neighbour were to reject the enrichment — which according to De Vos<sup>61</sup> he may do — then the builder would have no claim based on unjustified enrichment. Evidence demonstrated that the parties, especially the neighbour, behaved badly prior to the litigation, being less than co-operative and exchanging various threats.<sup>62</sup> The court’s view was that the neighbour’s stance in the matter is based on

‘anachronistic concepts of ownership: it represents a rigid and dogmatic insistence upon his perceived absolute rights as owner, irrespective of broader considerations of social utility, economic waste and neighbourliness’.<sup>63</sup>

While, in principle, these considerations are obviously important, it is unclear why in this situation ownership entitlements are affected so profoundly by a wrong committed by another. The award of compensation would mitigate the loss of the neighbour, but might do so only partly. Disapproval was expressed of the fact that he was unwilling to negotiate a sale based on the cost price of the plot. ‘[He] attempted to use his superior bargaining position in an endeavour to extract from the [builder] a much higher amount than he was entitled to.’<sup>64</sup> But why should he not negotiate to his advantage with the person who has effectively taken his land? In the current property market boom, realization of (inflated) profits from the sale of land, whether improved or not, is common. Why should he, without clear justification, be deprived of this possibility? Neighbourliness implies a relationship involving give and take, recognition of mutual responsibilities,

<sup>59</sup> *Wesbank* supra note 11 para 100(e)–(f) quoted above in note 11.

<sup>60</sup> Although beyond the scope of the topic here, this distinction is important for the implications it has for compensation. In general terms, a deprivation of property does not require compensation but expropriation does. See A J van der Walt *Constitutional Property Law* (2005) chaps 4 and 5.

<sup>61</sup> See note 52.

<sup>62</sup> *Brian Lackey Trust* supra note 7 paras 6–15.

<sup>63</sup> *Ibid* para 43.

<sup>64</sup> *Ibid* para 41.

etc. Did the builder act responsibly to ensure that the beacons demarcating his property were located? Apparently not.

Fairness and equity in neighbour law have a normative content, according to *Rand Waterraad v Bothma*.<sup>65</sup>

‘Where in a particular case, a neighbour’s entitlements flowing from his right in respect of land in terms of established rules and principles, would or could lead to great disadvantage of the other neighbour, fairness ensures that the former neighbour bears part of the prejudice that the latter neighbour suffered or at least would ensure that prejudice does not arise. Thus actual or potential prejudice is evenly spread between the neighbours.’<sup>66</sup>

The principle of burden-sharing is evident elsewhere too.<sup>67</sup> And in the case of trivial encroachments, it makes good sense and the justification is clear: the harmonization of relations between the neighbours on an approximately win-win basis through use of the rules of encroachment. Where the encroachment is extensive, on the other hand, the position is different. The rules of accession should apply. Matters of reallocation of rights and those of compensation ought not to be conflated.

In the case of accession, the builder’s remedy would be to claim only for materials and labour expended in building. The proposition that the builder should be protected because part of the building is on land belonging to him seems absurd. Depending on the facts, the builder might also have a concurrent claim for loss of possession of a portion of his land. For example, assuming that the major part of the building is on the neighbour’s land, while the lesser part is on the builder’s, the latter would have a claim for loss of possession of the affected portion, which could be resolved using the rules of encroachment. On the other hand, where approximately half of the building stands on each plot,<sup>68</sup> then finding a solution is made more complicated. The court’s solution was to order the neighbour to alienate his (unimproved) land at the then market value. On the face of it, this seems like a reasonable solution, at least for the builder, but it fails to account for why the building does not accede and for the validity of the forced sale. Unlike in *Christie v Haarhof*,<sup>69</sup> this neighbour was unwilling to divest himself of ownership. The basis for taking his land against his will was not explained satisfactorily. The neighbour could, of course, have chosen to sell his *improved* land to the builder at market value, but then the builder must pay twice for the half of the house built on the neighbour’s land, which does not accord easily with notions of reasonableness and fairness. A third solution may be offered: there were three virtually identical plots, two of which belonged to the builder and the third to the neighbour. The court could have ordered a double transfer,

<sup>65</sup> *Rand Waterraad v Bothma* supra note 42 at 125–30 per Hattingh J.

<sup>66</sup> My translation. See also *Botha v White* 2004 (3) SA 184 (T), *Dorland v Smits* 2002 (5) SA 374 (C).

<sup>67</sup> *Mostert v Cape Town City Council* 2001 (1) SA 105 (SCA).

<sup>68</sup> As happened in this instance; see *Brian Lackey Trust* supra note 7 para 33.

<sup>69</sup> See the text to note 54.

assuming for the sake of discussion that such an order is open to the court. In other words, the court could have ordered the parties to swap their plots as the most reasonable and fair way to resolve the difficult practical problem. That way each would have been similarly deprived but also similarly benefited, which, in the circumstances, seems fair.

## CONCLUSION

It goes against the grain that, in this case, it seems to have been assumed that the neighbour must suffer the deprivation, largely because very expensive building works had been erected. This assumption points to an emphasis on the rights of only one party, which is constitutionally unsound.<sup>70</sup> The rights of both parties must be fully considered. The maxim guarding against unjustified enrichment should apply to both. The court seems to take the view that only the neighbour could be enriched unjustifiably by the builder's error. But the solution adopted seems to enrich the builder, especially if the neighbour is permitted only the cost price of the land and a solatium as compensation. Given that building was at the heart of the matter, the focus of attention ought to have been the relationship between the building works and the land. The court's analysis does not consider all the complexities of the matter, including the implications of a forced sale, and thus does not make apparent a sufficient reason for depriving the neighbour of his land, which points to an arbitrary deprivation of property in violation of s 25(1) of the Constitution. The potential for future mischief by building over the boundary line in pursuit of acquisition of the neighbour's land is alarming. Deeper analysis may show, however, that for reasons of reasonableness, fairness and equity, the compelling purpose for depriving the neighbour does exist; nevertheless, without such analysis, this is not obvious.

The importance of maintaining the integrity of the principle-driven structure of property law cannot be overemphasized. Without such integrity, the system of landownership in South Africa would become chaotic and unsustainable in practical terms. Where departure from structure is necessary for policy reasons, this should be properly justified. In principle, compensation grounded in unjustified enrichment is available to a builder who builds partly on the land of another. The neighbour is entitled to demand removal. Whether removal should be supported depends on the extent of the encroachment. The court has discretion to suspend accession where the encroachment is insignificant because, on grounds of reasonableness and fairness, as well as in the interest of avoiding unnecessary economic waste, the more satisfactory solution to the problem may be to compensate the neighbour and to reallocate the rights in the land, assuming the neighbour's willingness to co-operate. Where the encroachment is extensive or

<sup>70</sup> *Brink v Kitshoff* NO 1996 (4) SA 197 (CC) para 43; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 33; *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC).

significant, then more compelling reasons must justify the deprivation of the neighbour's property. The difference between a trivial and a significant encroachment is a factual matter which must be determined on the specific facts of each case. Necessarily, therefore, the extent of the encroachment is an important factor in the determination of what is a reasonable, fair and equitable solution in a given context.